ZY PHYTO TECH INDUSTRIES (M) SDN BHD & ANOR v. NAZRI ZAKARIA & ORS

HIGH COURT MALAYA, SHAH ALAM
GUNALAN MUNIANDY J
[SUIT NO: 22CVC-855-07-2012]
29 SEPTEMBER 2017

CIVIL PROCEDURE: *Damages – Assessment of damages – Proof of actual loss – Whether burden borne by plaintiffs – Whether Deputy Registrar erroneously placed burden on defendants – Plaintiff's failure to produce profit and loss account – Whether compromised plaintiff's burden to satisfactorily prove actual loss*

The plaintiffs were the manufacturer and producer of herbal based healthy foods and drinks products for their clients and/or customers, whereby their clients and/or customers would use their own brand name and labels on the products. However, formulations and recipes of the products remained the exclusive ownership and trade secrets with the plaintiffs. The first and second defendants were the former sales managers for the plaintiffs. They resigned from the plaintiffs to start their own similar manufacturing/production/ marketing of the products, using the plaintiffs' formulation and recipes, either 100% or with slight alteration, without the plaintiffs' consent. The products were manufactured/produced, marketed and distributed by the first to the fourth defendants, for the plaintiffs' former client/ customer, one De Herbs Healthy Marketing and D'Herbs Healthy Sdn Bhd ('DHerbs'). Upon the full hearing, the High Court allowed the plaintiffs' claim and held, *inter alia*, that (i) the plaintiffs were the exclusive owners of the recipes for the products known as Premium Diet, Jus Perawan, Arjuna Maxx, Glow B White and Primadona Coffee; (ii) the first and second defendants had stolen information, trade secret and the customer of the plaintiffs; and (iii) the first and second defendants through the fourth defendant had manufactured and/or produced the similar products manufactured by the plaintiffs. On 26 January 2017, the Deputy Registrar ('DR') ordered that the plaintiffs' application *vide* a notice of appointment to assess damages ('the notice') be allowed as follows: (a) damages in the sum of RM18,313,360 for Jus Perawan, Arjuna Maxx, Primadona Coffee and Glow B White from the date of incorporation of fourth defendant until the date of final judgment; (b) damages in the sum of RM2,439,000 for premium diet from the date of incorporation of the fourth defendant until the date of final judgment and interest at 5% from the date of judgment with cost of RM3,000; (c) general damages not proven; (d) interest at the rate of 5% from the date of judgment until full settlement; and (e) cost of RM3,000. Dissatisfied, the defendant's appealed. The issues that arose for determination, was whether, at the hearing before the DR, the plaintiffs had proved actual loss as claimed.

Held (allowing defendant's appeal):

(1) The principle as to burden of proof in an assessment of damages is that the party that is entitled to damages under a court judgment, *ie*, the plaintiffs in this case, bears the burden of proving the loss or damage suffered. The defendants do not bear any onus of proof except to adduce evidence to rebut the case made out by plaintiff. (para 7)

(2) While the plaintiffs called several witnesses, a perusal of their evidence would show that as a whole, nothing satisfactory and credible was offered as to the actual loss that the plaintiffs suffered. PW4, the owner of the plaintiff himself admitted that the projection of loss was based on historical trend and not actual sales. Hence, without the production of a profit and loss account ('PLA') he could not testify satisfactorily on the actual loss. (para 11)

(3) PW4 himself chose not to disclose the PLA whereas the judgment made it imperative for the plaintiffs to produce an account of profits for the purposes of assessment. Hence, as PW4 himself chose not to produce an account of profits despite the order explicitly stipulating the requirement for an account of profits and payments received by plaintiffs, it would be erroneous to hold that the plaintiffs had proved damages in accordance with the order. In other words, an investigation and assessment of actual loss had to be carried out and not merely projected loss premised on previous trends and estimates. (para 12)

(4) There was no onus of proof whatsoever borne by the defendants unless the plaintiffs had led sufficient evidence to prove actual loss or damage as envisaged in the order, failing which no evidential burden shifts to the defendants under ss. 101 and 102 of the Evidence Act. The evidence that the plaintiffs led, without being supported by documentary proof *ie*, the PLA, was mere conjecture on the issue of loss that did not amount to proof. (para 21)

(5) The DR had seriously erred in principle and disregarded settled law on the burden of proof borne by the plaintiffs in making the award that was now appealed against without proof of actual loss or damage suffered by the plaintiffs. The projected or estimated loss of profit which the DR accepted was far from sufficient to satisfy the burden of proof in the assessment of damages under the terms of the order which makes no mention of projected or estimated loss of profit as a result of the defendants' actions. (para 23)

(6) The DR had also seriously erred in deciding that the plaintiff need not comply with the order as regards the production of a valid profit and loss account of the plaintiffs' firm during the material period which the order expressly requires for the purpose of calculation of actual loss. This fundamental error of principle by the DR was sufficiently grave to warrant interference on appeal. (para 24)

Case(s) referred to:

Chandran G Nair & Ors v. Affin Bank Bhd [2014] 8 CLJ 434 CA ***(refd)***

Hanafiah, Raslan, Mohamed & Partners v. Weng Lok Mining Co Ltd [1976] 1 LNS 39 HC ***(refd)***

Kurdamai Construction and Engineering Sdn Bhd v. Innosever Sdn Bhd and Ors [2014] 1 LNS 1267 CA ***(refd)***

Selva Kumar Murugiah v. Thiagarajah Retnasamy [1995] 2 CLJ 374 FC ***(refd)***

Tanjung Tiara Sdn Bhd v. Southwind Development Sdn Bhd [2011] 1 CLJ 105 ***(refd)***

Tey Moon Kim v. Hor Siew Mei [2012] 1 LNS 998 HC ***(refd)***

Legislation referred to:

Contracts Act 1950, s. 75

Evidence Act 1950, ss. 101, 103

For the plaintiffs - Saiful Izham Ramli & Azhar Arman Ali; M/s Saiful Kasri & Assocs

For the defendants - Hasshahari Johari Mawi & Mohd Rosly Ayub; M/s Hasshahari & Partners

Reported by Sandra Gabriel

JUDGMENT

Gunalan Muniandy J:

[1] This is an appeal against the decision of the learned Deputy Registrar ('DR') given on 26 January 2017 ordering that the plaintiffs' application *vide* notice of appointment to assess damages ('the notice') be allowed as follows:

(a) Damages in the sum of RM18,313,360 for Jus Perawan, Arjuna Maxx, Primadona Coffee and Glow B White from the date of incorporation of fourth defendant until the date of final judgment ie, the duration from Q2/2012 until Q2/2014.

(b) Damages in the sum of RM2,439,000 for premium diet from the date of incorporation of fourth defendant until the date of final judgment ie, the duration from Q2/2012 until Q2/2014 and interest at 5% from the date of judgment with cost of RM3,000.

(c) General damages not proven;

(d) Interest at the rate of 5% from the date of judgment until full settlement;

(e) Costs of RM3,000.

[2] The notice is pursuant to a judgment in favour of the plaintiff where the plaintiff had to prove actual loss. The relevant part of the judgment that had to be fulfilled by the plaintiffs reads that:

> (e) Bahawa siasatan terhadap gantirugi berhubung dengan perbuatan melanggar hak oleh Defendan-Defendan ditaksirkan oleh Mahkamah di atas pilihan Plaintif, satu akaun keuntungan dan bayarannya kepada Plaintif

A **Factual Background And Chronology Of Events**

[3] I adopt the brief facts and chronology of events as summarised in the plaintiffs' written submission as follows:

> The Plaintiffs in this action are the Manufacturer and Producer for herbal based healthy foods and drinks products, by using formulations and recipes which were developed through their own studies, research and development. The Plaintiffs had manufactured and produced those herbal based health food and drink products for their clients and/or customers, whereby their clients and/or customers will use their own brand name and labels on those products. However, formulations and recipes of those products shall remain the exclusive ownership and trade secrets with the Plaintiffs.
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> The First and Second Defendants in this action were the former Sales Managers for the Plaintiffs. They resigned from the Plaintiffs to start their own similar manufacturing/production/marketing of the products, using the Plaintiffs formulation and recipes, either 100% or with slight alteration, without the Plaintiffs' consent. The products were manufactured/produced, marketed and distributed by the First to the Fourth Defendants, for the Plaintiffs' former client/customer, one De Herbs Healthy Marketing and D'Herbs Healthy Sdn. Bhd. (hereinafter referred to as 'D'Herbs).
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> Upon the full hearing at the Shah Alam High Court, this Honourable Court has allowed the Plaintiffs' Summons and Statement of Claim and thereafter the Defendant' appeal at the Court of Appeal has been rejected with costs.

[4] At the conclusion of the full hearing of the original action the learned judge made the following findings:

(a) that the plaintiffs are the exclusive owners of the recipes for the products known as Premium Diet, Jus Perawan, Arjuna Maxx, Glow B White and Primadona Coffee;

(b) that the first and second defendants had stolen the information, trade secret and the customer of the plaintiffs known as De Herbs;

(c) that the first and second defendants through the fourth defendant had manufactured and/or produced the similar products manufactured by the plaintiffs to De Herbs;

(d) that all issues or objections that were raised by the defendants that they were not producing the premium diet product, but only producing diet gold, and did not produce Jus Perawan but only produced Jus Perawan Gold are rejected.

Issues For Determination

[5] The parties were in agreement that the sole issue for determination in the assessment of damages is whether at the hearing before the DR the plaintiffs had proved the actual loss as claimed.

[6] Order of the Deputy Registrar:

Upon reading and considering the evidence of witness and documents and written submission of parties it is today ordered that assessment of damages for the Plaintiffs are allowed as follows:

(a) The Defendants are jointly and severally to pay the Plaintiffs in the sum of RM18,313,360.00 as damages for products of Jus Perawan, Arjuna Maxx, Glow B White and Primadona Coffee for the period from second quarter of the year 2012 until second quarter of the year 2012.

(b) That the Defendants are jointly and severally to pay the Plaintiffs in the sum of RM2,439,000.00 for damages for product Premium Diet the period from second quarter of the year 2012 until second quarter of the year 2012.

(c) No order for general damages;

(d) Interest at 5% per annum on the sum at paragraphs (a) and (b); from the date of judgment until the date of full settlement; and

(e) Cost on scale of RM3,000.00.

Analysis And Finding

[7] The first and vital point to note is that the principle as to burden of proof in assessment of damages is that the party that is entitled to damages under a court judgment, ie, the plaintiffs ('P') in this case, bear the burden of proving the loss or damage suffered. The defendants ('D1- D4') do not bear any onus of proof except to adduce evidence to rebut the case made out by P. Sections 101 and 103, of the Evidence Act 1950 are clear on this principle.

[8] As correctly contended by the defendants, it is imperative for the plaintiffs at the assessment stage to prove their actual loss. Whilst liability had been adjudged against the defendants at the trial, quantum had yet to be determined and was the subject of assessment.

[9] The law as to burden of proof is expressed clearly in the case of *Tey Moon Kim v. Hor Siew Mei* [2012] 1 LNS 998; [2013] 7 MLJ 528 as follows:

Burden of proof

[23] In law, the party who desires the court to give judgment as to any legal right or liability bears the burden of proof (s. 101(1) of the Evidence Act 1950). The burden of proof is on that party is twofold: (i) the burden of establishing a case; and (ii) the burden of introducing evidence. The burden of proof lies on the party throughout the trial. The standard of proof required of the plaintiff is on the balance of probabilities. The evidential burden of proof is only shifted to the other party once that party has discharged its burden of proof. If that party fails to discharge the original burden of proof, then the other party need not adduce any evidence. In this respect it is the plaintiff who must establish its case. If

A the plaintiff fails to do so, it will not do for the plaintiff to say that the defendant has not established its defence (*Selvaduray v. Chinniah* [1939] 1 MLJ 253 (CA); s. 102 of the Evidence Act 1950). It should also be noted that there must be some preponderance in the plaintiff's favour at the conclusion of the whole case. Even if the plaintiff established a prima facie case, but at the conclusion of the trial the court found that the position
B was exactly even, then any preponderance in favour of the plaintiffs had ceased to exist. If that happens, then the plaintiff has failed to discharge the burden of proof which is upon it, and the plaintiff must necessarily fail (*Abrath v. The North Eastern Railway Company* (1883) 11 QBD 79 (CA)).

[10] Assessment of damages must be done strictly in accordance with the
C terms of the order of court under which the Registrar was ordered to carry out the assessment proceedings. It is, therefore, important to scrutinise the evidence presented by the plaintiffs at the hearing and determine whether it supported their claim for actual loss suffered by the plaintiffs as a result of the defendants marketing a similar product.

D **[11]** While the plaintiffs called several witnesses a perusal of their evidence would show that as a whole nothing satisfactory and credible was offered as to the actual loss that the plaintiffs suffered. PW4, the owner of the plaintiff himself admitted that the projection of loss is based on historical trend and not actual sales. Hence, without the production of a profit and loss account
E ('PLA') he could not testify satisfactorily on the actual loss. The estimate produced was on the basis of the profits if the products were sold by the plaintiffs. Neither was payment to the Inland Revenue Board, which would reveal profit and loss for the particular period, proved.

[12] A further noteworthy point is that PW4 himself chose not to disclose
F the PLA on the pretext that this account was not appropriate for this case whereas the judgment makes it imperative for the plaintiffs to produce an account of profits for the purposes of assessment. Thus, the plaintiffs cannot, under the terms of the judgment, rely on projected losses based on historical trends and sales estimates, which are contrary to the said terms. Hence, as
G PW4 himself chose not to produce an account of profits despite the order explicitly stipulating the requirement for an account of profits and payments received by plaintiffs it would be erroneous to hold that the plaintiffs had proved damages in accordance with the order. In other words, an investigation and assessment of actual loss has to be carried out and not
H merely projected loss premised on previous trends and estimates.

[13] PW3, an accountant, failed to quantify the losses suffered by the plaintiffs at the material time. He instead made bare statements of a projection of profits showing an increase but no decrease without reference to actual figures. He had, thus, failed to exercise reasonable care and uphold
I the standard of duty required of a professional accountant in ascertaining the loss to the plaintiffs.

(See *Hanafiah, Raslan, Mohamed & Partners v. Weng Lok Mining Co Ltd* [1976] 1 LNS 39; [1977] 1 MLJ 248).

[14] A case in point on the burden of proving both the fact and quantum of damages is the Court of Appeal case of *Chandran G Nair & Ors v. Affin Bank Bhd* [2014] 8 CLJ 434; [2015] 1 MLJ 59 where it was held:

> On the burden of proving both the fact and the amount of damages Ong Hock Thye FJ (as he then was) in *Guan Soon Tin Mining Co v. Wong Fook Kum* [1969] 1 MLJ 99 spoke of the burden of proof in this way:
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> > The respondent, as plaintiff, of course had to discharge the burden of proving both the fact and the amount of damages before he could recover. Where he succeeded in proving neither fact nor amount of damages he must lose the action ...

[15] It must further be noted that the order for assessment of damages based on an account of profits was granted at the instance of the plaintiffs. Hence, it is now misconceived for them to backtrack and contend at the assessment stage that the said account was unnecessary and that quantum can be assessed *via* projection and forecasting of which the order makes no mention.

[16] As to the principle that the court's finding should be founded on evidence even if it is circumstantial or equivocal, in another Court of Appeal case, *Kurdamai Construction and Engineering Sdn Bhd v. Innosever Sdn Bhd and Ors* [2014] 1 LNS 1267 it was held:

> It is well settled that the principle upon which an appellate court will interfere with an award of damages by a trial judge, has been laid to rest in *Davies v. Powell Duffryn Associated Collieries Ltd.* [1942] AC 601, which was followed by *Dingle v. Associated Newspapers Ltd and Ors* [1964] AC 371, and that is, the appellant must show that the trial judge had acted on a wrong principle of law or has misapprehended the facts or has made a wholly erroneous estimate of the damage suffered ...

[17] Even in a case where there is inherently any actual loss or damages which the plaintiffs contended there was in this case, the onus remains on the plaintiff to prove such actual loss or damage, failing which the court could justifiably refuse to award such damages despite the words of s. 75 of the Contracts Act. (See *Selva Kumar Murugiah v. Thiagarajah Retnasamy* [1995] 2 CLJ 374 Federal Court).

[18] The plaintiffs' primary contention was that the main crux of the assessment is merely to calculate the amount of loss that they had suffered and not whether the witnesses called had knowledge of the subject-matter of the action, ie, the products in question. In their submissions, they concluded, *inter alia*, as follows:

> Throughout the whole of the hearing for the assessment of damages, there is no evidence made available or adduced by the Defendants to show that the Plaintiffs are trying to enrich themselves. It is an undeniable fact that the Plaintiffs suffered loss due the act of the Defendants and they should be compensated accordingly for the loss suffered.

A The Plaintiffs submit that the Plaintiffs' projection on the loss is just and reasonable because the projections were based on the Plaintiffs' historical sales data, prior to the Defendants' action which has caused the loss. The historical data were never challenged as it was based on actual sales between the Plaintiffs and De Herbs.

B **[19]** The plaintiffs finally contended that the defendants had failed to rebut their case as the defendants themselves failed and/or elected not to produce any alternative actual sales data on the products they have produced and sold. It was alleged that the defendants themselves did not come clean.

[20] In support of this proposition, reference was made to the Court of C Appeal case of *Tanjung Tiara Sdn Bhd v. Southwind Development Sdn Bhd* [2011] 1 CLJ 105 where Low Hop Bing JCA, pronounced that:

The plaintiff's claim for damages was supported by the estimate and the consequential computation of 25% of the contract value. There was no challenge to this computation on cross-examination. The computation D was supported by the defendant's own computation in its third party contract wherein it arrived at an estimated profit of 33.27% of the third party contract value.

The trial judge had accepted the evidence for the plaintiff on its computation of loss of profit, which amount he awarded to the plaintiff. E The judge's award was primarily based on his finding of facts having regard to the evidence adduced at the proceedings for assessment of damages. There was no appealable error in his award of damages.

[21] To this proposition, the short answer would be that there is no onus of proof whatsoever borne by the defendants unless the plaintiffs have led F sufficient evidence to prove actual loss or damage as envisaged in the order, failing which no evidential burden shifts to the defendants under ss. 101 and 102, of the Evidence Act, which was obviously the position in this case. The evidence that the plaintiffs led, without being supported by documentary proof ('PLA'), was mere conjecture on the issue of loss that did not amount to proof.

G

Conclusion

[22] I have carefully considered the terms of the order in this case, the established principles on the awarding of damages and the contentions of both sides as well as the grounds of decision of the learned DR.

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[23] This court upon a proper consideration of the above and the grounds of appeal finds that the DR had seriously erred in principle and disregarded settled law on the burden of proof borne by the plaintiffs in making the award that is now appealed against without proof of actual loss or damage suffered by the plaintiffs in this case. My view is that projected or estimated loss of I profit which the DR accepted is far from sufficient to satisfy the burden of proof in the assessment of damages under the terms of the order which makes no mention of projected or estimated loss of profit as a result of the defendants' actions.

[24] The DR had also seriously erred in deciding that the plaintiff need not comply with the order as regards the production of a valid profit and loss account of the plaintiffs' firm during the material period which the order expressly requires for the purpose of calculation of actual loss. This fundamental error of principle by the DR was sufficiently grave to warrant interference on appeal.

[25] For these reasons, principally, I find that there are merits in this appeal which, therefore, ought to be allowed.

[26] This appeal is, accordingly, allowed and the order of DR is set aside with costs.

[27] Costs of RM5,000 to appellants.